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Isabela Madeline Roy & Ors v Sarimah Low bte Abdullah & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4(3)–22–795 OF 1999
FAIZA TAMBY CHIK J
B 12 OCTOBER 2004

Family Law — Marriage — Validity of — Monogamous first marriage — Subsequent second marriage, whether valid — Whether children of second marriage had right of inheritance

C *Land Law — Assignment — Deed of Assignment — Assignment by deceased while ill and suffering failing eyesight — Conditions precedent to assignment not fulfilled — Duty of solicitor — Whether assignment valid*

The plaintiffs were the children of the deceased from his marriage with the first defendant. The deceased entered into a Christian monogamous marriage
D with the first defendant. While the first defendant was still alive, the deceased subsequently married the second defendant. There was no evidence that the deceased divorced the first defendant. The issue pertained to a purported assignment of a property of the deceased to the second defendant. The property – a flat – were subjected to a five-year restriction on its dealings from the date
E of full payment of purchase price and required the prior written consent of the Datuk Bandar before it could be dealt with, both conditions of which were not fulfilled. The assignment was said to be done via the deceased's advocate and solicitor, one DW2 while the deceased was already ill. The defendants pleaded on the validity of the assignment but did not produce the
F deed of assignment.

Held, dismissing the counterclaim:

(1) The court must presume, until the contrary is proven, that the deceased and the first defendant were both alive when the deceased entered into
G the civil marriage with the second defendant. Since there was the certificate regarding the marriage of the deceased and the first defendant in 1957, the burden shifts to the other defendants to prove facts showing that the deceased had the capacity (through dissolution of marriage by divorce, nullity or death of the first defendant) to marry the second defendant
H (see para 2).

(2) The deceased had no capacity to enter into a polygamous marriage with the second defendant. Having entered into a Christian marriage, the deceased could not lawfully, while that marriage was subsisting, marry another woman. Therefore, the deceased's subsequent marriages, including
I to the second defendant were null and void and of no effect. This was because the deceased continued to be the husband of the first defendant. The third and fourth defendants had no right of inheritance from the

estate of the deceased because there was no valid marriage between their parents, namely the deceased and the second defendant; *Re Ding Do Ca, deceased* [1966] 2 MLJ 220 distinguished (see para 3).

(3) The flat was not the subject matter of a valid assignment created by the deceased. There was no or no complete documentation of such an assignment and there was no approval of such a transaction from the Datuk Bandar. The deed of assignment or a copy of it was also not produced. Therefore the court drew an adverse inference under illustration (g) to s 114 of the Evidence Act 1950. DW2 should not have taken instructions on the preparation of the assignment in the presence of the second defendant who now claimed to be the assignee. DW2 did not advise the deceased to obtain independent legal advice. DW2 therefore had prepared a defective deed of assignment or an assignment which could not be perfected (see paras 5 and 6).

[**Bahasa Malaysia summary**

Plaintif-plaintif merupakan anak-anak kepada si mati daripada perkahwinannya dengan defendan pertama. Si mati telah berkahwin dengan defendan pertama melalui perkahwinan monogami Kristian. Semasa defendan masih hidup, plaintif telah berkahwin dengan defendan kedua. Tiada keterangan menunjukkan bahawa si mati telah menceraikan defendan pertama. Isu adalah berkaitan dengan serahhak suatu hartanah si mati kepada defendan kedua. Hartanah itu – satu unit rumah pangsa – adalah tertakluk kepada sekatan lima tahun didalam urusannya daripada tarikh pembayaran penuh bayaran pembelian dan memerlukan persetujuan bertulis daripada Datuk Bandar sebelum boleh berurusan dengannya, di mana kedua-dua syarat tersebut tidak dipenuhi. Serahhak itu dikatakan telah dibuat melalui peguambela dan peguamcara si mati, DW2 setelah si mati jatuh sakit. Defendan telah memplidkan kesahihan serahhak itu tetapi tidak mengemukakan suratikatan penyerahhakan.

Diputuskan, menolak tuntutan balas:

(1) Mahkamah mestilah menganggap, sehingga dibuktikan sebaliknya, bahawa si mati dan defendan pertama masih lagi hidup semasa si mati memasuki gerbang perkahwinan sivil dengan defendan kedua. Apabila terdapat suatu sijil mengenai perkahwinan si mati dan defendan kedua pada 1957, beban telah beralih kepada defendan-defendan lain untuk membuktikan fakta-fakta yang menunjukkan si mati mempunyai kapasiti (melalui pembubaran perkahwinan dengan cara penceraian, pembatalan dan kematian defendan pertama) untuk berkahwin dengan defendan kedua (lihat perenggan 2).

(2) Si mati tidak mempunyai kapasiti untuk memasuki perkahwinan poligami dengan defendan kedua. Dengan memasuki suatu perkahwinan Kristian,

si mati tidak boleh secara sahnya, semasa perkahwinan itu masih wujud, berkahwin dengan perempuan lain. Oleh itu, perkahwinan si mati yang berikutnya, termasuk dengan defendan kedua adalah tidak sah dan terbatal dan tidak mempunyai kesan. Ini adalah kerana si mati masih lagi berterusan menjadi suami kepada defendan pertama. Defendan ketiga dan keempat tidak mempunyai hak pewarisan daripada harta pusaka si mati kerana tiada perkahwinan yang sah di antara ibu bapa mereka, iaitu si mati dan defendan kedua; *Re Ding Do Ca, deceased* [1966] 2 MLJ 220 dibeza (lihat perenggan 3).

(3) Unit rumah pangsa itu bukan merupakan perkara subjek suatu serahhak yang sah yang diwujudkan oleh si mati. Tiada terdapat atau tiada dokumentasi sempurna serahhak tersebut dan tiada kelulusan transaksi tersebut daripada Datuk Bandar. Oleh itu mahkamah telah membuat inferens bertentangan di bawah ilustrasi (g) kepada seksyen 114 Akta Keterangan 1950. DW2 tidak sepatutnya mengambil arahan untuk penyediaan serahhak di hadapan defendan kedua yang sekarang ini mengaku sebagai pemegang serahhak. DW2 tidak menasihatkan si mati untuk mendapatkan nasihat undang-undang bebas. Oleh itu, DW2 telah menyediakan suratikatan penyerahhakan yang defektif atau serahhak yang tidak boleh disempurnakan (lihat perenggan 5 dan 6).]

Notes

For cases on validity of marriage, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3290–3293.

For monogamous marriages, see 8 *Halsbury's Laws on Malaysia* paras [140.182]–[140.185].

For illegitimacy and property rights, see 8 *Halsbury's Laws on Malaysia* para [140.173].

Cases referred to

Chin Moi & Anor v Chew Pen Hock [1976] 1 MLJ 190 (refd)
Eeswari Visuvalingam v Government of Malaysia [1990] 1 MLJ 86 (refd)
In the Estate of Pang Soo Ho, decd [1982] 2 MLJ 147 (refd)
Malayawata Steel Berhad v Government of Malaysia & Anor [1977] 2 MLJ 215 (refd)
Pedley v Majlis Ugama Islam Pulau Pinang & Anor [1990] 2 MLJ 307 (refd)
Re Ding Do Ca, decd [1966] 2 MLJ 220 (distd)

Legislation referred to

Distribution Act 1958 s 3
Evidence Act 1950 s 114 illustration (g)
Law Reform (Marriage and Divorce) Act 1976 ss 4(2), 5, 6
Small Estates (Distribution) Act 1955

PS Rajan (Kailesh Arumugam with him) (Kailesh Aru & Co) for the plaintiff.

Nadarajan (AG Dass with him) (Bosco Phillip Anthony & Assoc) for the second, third and fourth defendants.

Faiza Tamby Chik J:

[1] It is not disputed on the pleadings that the plaintiffs are the children of Teddy Rock Roy ('the deceased') from his marriage with the first defendant. The deceased entered into a Christian marriage with the first defendant on 24April 1957. It was a monogamous marriage and was deemed to be registered under s 4(2) of the Law Reform (Marriage and Divorce) Act 1976. A copy of the marriage certificate is at p 1 of the plaintiffs' bundle of documents ('P1'). The first defendant later left the deceased and apparently became a Muslim and entered into a Muslim marriage with another man. She has not entered an appearance to this action although she has been served with the writ of summons (see the affidavit of service by Morgan Lawrence Roy, who is the fifth plaintiff — he personally served the writ on his mother, the first defendant). There is no evidence that the deceased divorced the first defendant, although he could have done so if he had wanted to. The deceased entered into a civil marriage with the second defendant on 3 June 1980: see copy of the marriage certificate at p 6 of the third and fourth defendants' bundle of documents ('D2'). He had falsely stated that he was a divorced man when he married the second defendant. Since the deceased had contracted a monogamous marriage with the first defendant, the deceased had no capacity to enter into the marriage with the second defendant, while the first defendant was still alive. The second defendant therefore has no right of succession or inheritance (see the Law Reform (Marriage and Divorce) Act 1976, ss 5 and 6). The deceased died on 22 August 1998 (see the copy of the death certificate at p 12 of P1).

[2] There is no evidence that the first defendant has died or, more specifically, that she had already died so as to make the deceased a widower, when the deceased entered into the civil marriage with the second defendant. Since there is evidence that the deceased and the first defendant were both alive earlier, the court must presume, until the contrary is proven, that they were both alive when the deceased entered into the civil marriage with the second defendant. Since there is the certificate regarding the marriage of the deceased and the first defendant in 1957, the burden shifts to the other defendants to prove facts showing that the deceased had the capacity (through dissolution of marriage by divorce, nullity or death of the first defendant) to marry the second defendant (see *Eeswari Visuvalingam v Government of Malaysia* [1990] 1 MLJ 86). The first defendant had gone through a civil marriage ceremony with one Subramanian a/l Letchumanan on 26 January 1968 (see the copy of the marriage certificate at p 66 of D2). The first defendant had embraced Islam on 10 August 1973 (see the copy of the certificate at p 4 of D2). The first defendant had no capacity to marry Mr Subramaniam because she was still

married to the deceased. The first defendant's conversion to Islam did not, by itself, dissolve the deceased's marriage to her (see *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307).

[3] The deceased had no capacity to enter into a polygamous marriage on 23 May 1980 with the second defendant. He was a Christian Eurasian. He was not a Chinese. Therefore, *Re Ding Do Ca, decd* [1966] 2 MLJ 220, in which it was reiterated that, in the case of the Chinese, their personal law is based on the race, and not their religion, does not apply. Having entered into a Christian marriage, the deceased could not lawfully, while that marriage was subsisting, marry another woman. (See *In the Estate of Pang Soo Ho, decd* [1982] 2 MLJ 147). Therefore, the deceased's subsequent marriages, including to the second defendant on 23 May 1980, are null and void and of no effect. This is because the deceased continued to be the husband of the first defendant. The third and fourth defendants have no right of inheritance from the estate of the deceased because there was no valid marriage between their parents, namely the deceased and the second defendant. 'Child' must mean legitimate child (see the Distribution Act 1958 s 3).

[4] The court has the jurisdiction to make the declarations prayed for (see *Chin Moi & Anor v Chew Pen Hock* [1976] 1 MLJ 190). The plaintiffs therefore seek the declarations prayed for and the counterclaim should be dismissed with costs.

[5] The flat known as No 15034, Block 15, Flat Razak Mansion in Jalan Sungei Besi, Kuala Lumpur is not the subject matter of a valid assignment created by the deceased. There is no complete documentation of such an assignment and there is no approval of such a transaction from the Datuk Bandar. The benefit of the sale and purchase agreement entered into by the deceased with the Datuk Bandar (see pp 16–26 of D2) may be assigned by the deceased only with the consent of the Datuk Bandar. Section 6.04 of the agreement provides that the agreement is binding upon the permitted assigns of the deceased (see p 23 of D2, where the words 'penerima serahan yang dibenarkan' are used). By section 4.05 of the agreement (see p 21 of D2), the deceased was bound by two specific restrictions against dealing with the flat. The restrictions were:

(i) a five year restriction against transactions regarding the flat, time to run from the date of full payment of the purchase price; and

(ii) the prior written consent from the Datuk Bandar.

[6] The final installment was to be paid in June 1992 (see p 30 of D2). Therefore, no transaction in respect of the flat could be undertaken until after the last payment was made. However, before the five year period was to expire in June 1997, M/S AJ Ariffin, Yeo & Harpal purported to deliver a deed of assignment to the Datuk Bandar (see p 35 of D2). The Datuk Bandar

rejected that transaction because 'pemohon tidak mendaftar bagi tujuan di atas' and sent a 'Borang Penjualan Semula' (it is not a deed of assignment, see pp62 and 63 of D2, the words used are 'Borang Permohonan Menjual Rumah'). Therefore, there was no valid assignment as the Datuk Bandar had not given consent. In the present case, the solicitors conveyed a premature request to the Datuk Bandar for an assignment to be created. That request was rejected. The condition precedent had not been fulfilled. If an assignment is a conditional one, it is unenforceable (see *Malayawata Steel Berhad v Government of Malaysia & Anor* [1977] 2 MLJ 215).

[7] There is no trust created either. No document evidencing any trust was produced. No trust is pleaded by the second, third and fourth defendants. They have pleaded an assignment (see paras 18, 19 and 21 of the defence and counterclaim). The deed of assignment or a copy of it (see the letter at p 35 of D2) has not been produced. Therefore the court draws an adverse inference under illustration (g) to s 114 of the Evidence Act 1950. The (undisclosed) deed of assignment was prepared by DW2 who was an advocate and solicitor and apparently an old friend of the deceased and the second defendant. DW2 said that he took instructions in the presence of the alleged assignee (the second defendant). At that time, the deceased was already ill and was suffering failing eyesight. DW2 was aware of the deceased's earlier marriage. The position of the children of the earlier marriage, namely the plaintiffs, was not considered. No medical examination of the deceased was undertaken or advised for the purpose of ascertaining whether he was of sound mind and was not unduly influenced, including by the second defendant. In such a sensitive matter, DW2 should not have taken instructions in the presence of the second defendant, who now claims to be the assignee. DW2 did not advise the deceased to obtain independent legal advice. DW2 prepared a defective deed of assignment or an assignment which could not be perfected.

[8] I am of the opinion that the counterclaim should be dismissed because it would be made, if at all, against the estate of the deceased, which is not a party to this action, and the facts allegedly supporting the counterclaim should be raised, if at all, before the land administrator in the proceedings under the Small Estates (Distribution) Act 1955. Furthermore, the counterclaim has not been brought additionally against the first defendant who remained the wife of the deceased and, upon his death, became a beneficiary of his estate. In the absence of a lawful marriage between the deceased and the second defendant, and in the absence of a duly documented and valid assignment by the deceased for the benefit of the second defendant, the counterclaim is hereby dismissed with costs. Order in terms of Lampiran 1.

Counterclaim dismissed with costs.

Reported by Loo Lai Mee